

# Merger & Acquisition in Tunisia

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## I. Structuring

### a. Due diligence

#### i. Methodology

For a Successful Transactions, it can substantially enhance probability of success by:

- understanding objectives of the transaction;
- developing mutually agreed procedures;
- providing professional strategic, commercial and financial due diligence with regional intelligence
- providing regular reporting which links commercial and financial issues to strategic objectives of the corporation;
- facilitate decision making and transaction negotiations; and
- assist with post transaction implementation procedures.

#### ii. Relevant information

The point is to gather and share all relevant information so each organization can make sound decisions. Typical information includes:

- legal and organizational structure, including board of directors bylaws and composition, as well as subsidiary information;
- financial data, such as assets, liabilities, audits, revenue history, current financials, reserves, and real estate holdings;
- current budget information that details revenue, revenue sources, and expenses;
- service data that shows volume, capacity, and utilization;
- contracts and agreements documentation, including any pertaining to revenues and expenditures, contracted personnel, service delivery agreements, and lease agreements;
- human resource data, such as organizational charts, salary and benefits data, policies regarding vacation or sick time, and information about staff longevity and length of service;
- retiree benefits and obligations; and
- Lawsuits, including any that are pending and those with active obligations.

Our sets of due diligence services assist clients in understanding and implementing effective risk management control mechanisms and processes

#### iii. Evaluation and pricing mechanism

We need to assign a value or more specifically a range of values to the Target Company so that we can guide the merger and acquisition process. We need answers to several questions: How much should we pay for the target company, how much is the target worth, how does this compare to the current market value of the target company, etc..?

It should be noted that the valuation process is not intended to establish a selling price for the Target Company. In the end, the price paid is whatever the buyer and the seller agree to. With an investigative analysis of a business, assessing the key issues facing the business and the drivers behind maintainable profits and cash flows.

**b. Available structures under the legal system**

For any company acquisition, due diligence would include fully understanding all of the obligations of the company: debts, pending and potential lawsuits, leases, warranties, long-term customer agreements, employment contracts, distribution agreements, compensation arrangements, and so forth.

**c. Structuring considerations:**

**i. Tax**

Tax due diligence review plays a critical role in any merger and acquisition (M&A) transaction in Tunisia. It is not just about uncovering and quantifying contingent liabilities, although this is obviously important.

The vast majority of deals fail to achieve targeted returns by not capturing or maximising upside benefits and or by not identifying hidden liabilities and downside risks. A well conducted tax due diligence, in conjunction with legal and financial reviews, should expose these issues and opportunities and help achieve a successful investment. Tax can be a large cost, but also a rich source of cash flow savings if managed properly.

**ii. Regulatory**

There is a growing demand for expertise in helping businesses cope with challenges associated with new regulatory frameworks in Tunisia. With new programs for corporate sanctions now emanating from financial institutions like the World Bank and regional development banks, the need for businesses and investors to control regulatory risk has never been more pressing. Diligence is positioned, especially in emerging markets and on behalf of international financial institutions and multinational corporations, to respond to the new regulatory push for greater accountability and transparency.

**iii. Time line**

**According to law n°91-64 of July 29, 1991, as amended and completed by Law n°93-83 of July 26, 1993, Law n°95-42 of April 24,1995, Law n°99-41 of May 10,1999, and Law n° 2003-74 of November 11, 2003, Law n°2005-60 of July 18, 2005, and Decree n°1215 of July 10, 1995,** notification of any agreement or draft of agreement to the Minister of Trade is required any time if the agreement is still in the status of a draft, or within fifteen days from the date of signing the agreement, or the merger or the publication of the purchase or exchange of rights or obligations, or the acquisition of a control participation. In that respect, the related parties could sign the agreement before filing is made or before clearance is obtained, provided that they comply with the legal obligation of notification within fifteen days from the signing of the agreement, and that they refrain from taking irreversible measures.

The decision is adopted with a maximum of six months from the date on which complete notification was received. The Minister of Trade has to give a decision on the agreement within six months of the date on which complete notification was received. Within this time-frame, the Minister in Charge of Trade submits any concentration project or operation to the Competition Council which must give its opinion within a time-frame not exceeding three months.

The Competition Council assesses whether the agreement or draft agreement contributes to the economical and social progress in order to compensate the interference with competition. In case of abuse of a dominant position resulting from a concentration, the Competition Council may suggest to the Ministry on charge of Trade or by taking a motivated decision, if need be, jointly with the Minister of the relevant sector, for the related company or group of companies to amend, add, or terminate, all agreements through which the concentration was implemented, even though the procedures contained in the merger control law were complied with.

#### **iv. Social considerations**

The risks associated with financing projects can vary significantly according to the geographical location of the project. While many projects that the banks are asked to consider financing are in compliance with national legislation and permit requirements, they may fall short of international standards and best practice. A detailed understanding of the project's political and legal framework is required in order to judge the extent to which national requirements meet the risk management needs of international financial organisations.

#### **v. Other considerations**

##### **1. Retain local legal counsel.**

A key starting point is to understand the legal and regulatory environment of the country (ies) in which the target company is located or does business. As a result, it is also critical that the attorney selected has significant experience working with multinational corporations, and "speaks the same language" from a risk management and compliance perspective.

##### **2. Determine formation and ownership.**

At times, the identity of owners, the existence of voting blocs or shareholder agreements, or the authorization of an individual to speak on behalf of the entity or owners is not clear, and cannot be determined solely by a review of public records.

##### **3. Understand reputation and risk.**

Another key area for diligence is reputation, not only of the target entity, but also of its key officers, directors and owners.

##### **4. Know the political risks.**

The recent political event in the country highlights the political risk of doing business. The goal in conducting political risk due diligence is to help determine non-commercial risk that may exist in conducting business.

#### **d. Anti-competition laws.**

The legislation controlling merger activities in Tunisia is Law 91-64 dated July 29<sup>th</sup> 1991 (as amended on a number of occasions since then). The aim of this legislation is to ensure that the merger process does not run into competition issues and does not alter the market structure.

The scope of the Law applies to any merger likely to create a dominant position in the local market, or a substantial portion of it. The Law defines a merger as any transfer of property, or of the use of all or part of the property, rights or liabilities of a company, that enables a company or group of companies to exert a decisive influence directly or indirectly on one or more companies.

According to Article 7 of the Law, the companies involved in the merger – whether they are parties to the agreement or target companies – must between them meet two criteria to satisfy competition requirements:

- The combined market share of the previous business year must not exceed 30% of the sales, purchases or all other transactions on the local market for goods, products or substituted services, or on a substantial part of this market; and

- The combined turnover on the local market does not exceed TD3 million (\$2.4 million). Should related companies between them meet the above criteria they must then notify the minister of trade of the proposed merger.

Tunisian merger law does not provide for different thresholds relating to financial institutions.

e. Foreign investment laws and foreign ownership restrictions

Under the rules of the Investment Incentives Code (Law 93-120 dated December 12<sup>th</sup> 1993), foreign investments in industry and services are free in Tunisia. The investment shall, however, be declared to the Agency for the Promotion of Industry. It is, nonetheless to be pointed out that within the framework of same code activities of services not wholly engaged in export are subject to other authorizations.

In accordance with the Euro-Med Association Agreement entered into by the European Community and its member States, and the Tunisian Republic, and that came into force on March 1, 1998, the parties committed themselves to creating a free trade area between themselves by the year 2010.

On Merger and acquisition, the Euro-Med Association Agreement provides in its Article 36, paragraph 1, that:

“all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

- abuse by one or more undertakings of a dominant position in the territories of the Community or of Tunisia as a whole or in a substantial part thereof; (...) are incompatible with the proper functioning of the Agreement, as they may affect trade between the Community and Tunisia”.

According to paragraph 2 of the same Article, “any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community (...)”.

Pursuant to Article 36, paragraph 3, “the Association Council shall, within five years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraph 1 (...)”.

Consults is performing due diligence works and business analyses for organizations that are Contemplating investments, strategic partnerships and mergers and acquisitions.

We are generating valuable due diligence reports and business analyses that become an integral Component of clients’ decision-making and negotiation processes. We are offering a confidential,

We are offering due diligence services with a focus on investment viability. We seek to evaluate:

- Is the project feasible as conceived?
- Can the project be financially viable?
- Are the capital, operating and maintenances costs reasonable?
- Have the country, market and other environmental issues been adequately addressed?
- Does the project have the potential for a positive net present valuation?

Our due diligence work includes the following procedures;

- Define and understand the client’s needs and the type of investment.
- Understanding the company structure and performing benchmark with similar type of Companies...

## II. Merger Agreement

Relevant legislation as regards to the control of the merger process under the Tunisian jurisdiction is **Law n°91-64 of July 29, 1991**, as amended and completed by **Law n°93-83 of July 26, 1993**, **Law n°95-42 of April 24, 1995**, **Law n°99-41 of May 10, 1999**, and **Law n° 2003-74 of November 11, 2003**, **Law n°2005-60 of July 18, 2005**, and **Decree n°1215 of July 10, 1995**.

### a. Pre-merger agreements

#### i. Confidentiality and non--disclosure agreement

A Nondisclosure Agreement is more than a commitment to keep the informations secret; you also don't want the other party to use your confidential information for their own benefit. You want to protect your ideas with the NDA. As the old saying goes (absent a promise to keep a secret), "ideas are as free as the wind." Copyrights can protect your "expressions" of an idea (like music, a novel, software code, or a photograph or painting, among other things); and a patent can protect your idea that is used to create a non obvious and useful invention. But an idea is free to copy – so you need to protect them as a secret. This means that other party should never be able to use your idea freely; a well drafted NDA should limit the purposes for which the confidential information may be used.

#### ii. Exclusivity Agreement

In any negotiated corporate acquisition, there is a substantial risk that the deal will not be consummated. Another party may approach the target board with an alternative, presumably higher-priced, acquisition proposal.

When there is an exclusivity agreement, a board of directors has broad discretionary authority to decide whether to merge with another merger.

#### iii. Memorandum of Understanding

A Memorandum of understanding (MOU) is a document used in merger to express a convergence of will between the parties .It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement.

### b. Scope

#### i. Parties

Parties in Merger agreement must mention: The name, position and address of each party.

If one of the contracting parties is a corporation, indicate its legal form, registered office, registration number in the register of commerce and companies. The contract must be signed by its legal representative or failing that by a person specially authorized to bind the company under the contract in question.

#### ii. Description

The Merger contract is generally based on the language of the agreement and the intent of the parties.

Merger agreement governs the conditions and terms of an acquisition. This contract is a legal document and is prepared before the acquisition.

This agreement contains all pertinent information relating to the merger and begins with an opening paragraph that lists the price of the business deal and the details of what the purchase includes. Other items included in the agreement are representations and warranties, covenants, conditions, indemnification, and termination procedures and remedies.

Fusion-acquisitions in Tunisia affected all the sectors of economic activity but they are more frequent in the industrial sector. Indeed, 55% of the companies absorbing and 58% of the surviving companies belong to different industrial sectors. **The tertiary sector comes in second position with 44% of the companies absorbing and 47% of the surviving companies' operative in it.**

M& A in Tunisia join together, in general, the companies of the same sector of activity and operative on the same markets. Moreover, the distribution of the surviving companies and of the surviving companies within the same branch of industry is almost identical.

In the industrial sector, the operations of M&A are more frequent in the textile sector (29%), mechanical engineering industry and electric (14%) and chemical industry (14%). The operations of M & A within the sector of the textile accelerated. Indeed 70% of these operations were held from the year 2005.

A definitive merger agreement serves other purposes as well. These agreements are also used for acquisitions that consist of the purchasing of stock shares and acquisitions that consist of the purchasing of assets.

### c. Important clauses

#### i. Merger, acquisition or purchase clause

Parties agrees that, in the event of any dissent to the merger agreement or any relevant merger matter raised by their respective shareholders in accordance with the law, **they shall proceed with the purchase of the shares owned by the dissenting shareholders in accordance with the Tunisian Corporate Merger and Acquisition Act and the commercial Company Law**, respectively. The shares so purchased by parties shall, to the extent permitted by laws and regulation and the permission of the competent authority, be cancelled on the Record Date. The registration for such share cancellation shall be made together with the registration of the cancellation of the outstanding shares of parties upon dissolution of latter

As indicated in Article 319 (Chapter Four) - **Des Sociétés par Actions in 'Code de droits des Sociétés'** : « En cas de fusion de sociétés par voie d'absorption ou de création d'une société nouvelle englobant une ou plusieurs de sociétés préexistantes, ainsi qu'en cas d'apport partiel d'actif par une société à une autre, l'interdiction de négocier les actions ne s'applique pas aux actions d'apport attribuées à une société par actions ayant, lors de la fusion ou de l'apport plus de deux ans d'existence et dont les actions étaient précédemment négociables. L'interdiction de négocier les actions ne s'applique pas également aux actions de la société mère ou holding à laquelle les actions ou les parts ont été attribuées suite à une opération de restructuration d'entreprises visant son introduction à la bourse des valeurs mobilières de Tunis ».

#### ii. Representations and warranties

Regardless of the structure of the transaction, merger and acquisition agreements have an important feature which is examined in representations and warranties.

The seller and the buyer will make representations and warranties to the other in the acquisition agreement. The seller's representations and warranties typically make up the largest part of the acquisition agreement. Representations and warranties serve three important purposes. First, they are informational. The seller's representations and warranties, coupled with the buyer's due diligence, enable the buyer to learn as much as possible about the seller's business prior to signing the definitive acquisition agreement. Second, they are protective. The seller's representations and warranties provide a mechanism for the buyer to walk away from, or possibly to renegotiate the terms of, the acquisition, if the buyer discovers facts that are contrary to the representations and

warranties between the signing and the closing. Third, they are supportive. The seller's representations and warranties provide the framework for the seller's indemnification obligations to the buyer after the closing.

iii. Liabilities and limitation of liability

In a Merger agreement, if investors want managers to be monitored, the monitors should be residual claimants (shareholders), and monitoring and firm value will increase as shareholders commit more of their wealth to the firm. When liquidating wealth is costly, contingent liability dominates direct investment as a wealth commitment device; however, if wealth is unobservable, under this regime only relatively poor investors will hold shares in equilibrium. This may be prevented at a cost by verifying shareholder wealth and restricting stock transfers.

iv. Choice of law clause

Choice of Law and Forum Clause in Contracts will often contain language expressing that they are to be interpreted under the laws of a particular state or jurisdiction. In general, when the parties are nationals, they used to apply the Tunisian law to their contracts.

v. Dispute resolution clause

The parties shall attempt to resolve any dispute arising out of or relating to the contract through negotiations between them.

If the matter is not resolved by negotiation, the parties will attempt to resolve the dispute within Tunisian Jurisdiction System or by arbitration.

d. Employment law and pension issues

The Tunisian Employment Code (**law n°27 dated on 30 of April 1966**) and the **decree number 1974-0499 dated on 27<sup>th</sup> of April 1974** apply to employment issues as well as to pension issues. Pension issues are usually not the first concern of the parties involved in a purchase and sale transaction. However, because of the potential effect of pension liabilities, companies are increasingly concerned about pension plans in corporate transactions. Pension issues can affect the amount of due diligence required, the purchase price, the representations and warranties, and the obligations of the buyer to transferred employees. The keys to dealing with pension related concerns in a complex corporate transaction are to obtain as much information as possible about the pension plans involved and to seek expert pension advice as early as possible in the process.

e. Approvals internally

i. Limited Liability Companies

Article 412 of the Tunisian Commercial Companies Code provides that "the merger may bring companies of the same shape or companies of different forms. However, it must in any case lead to the formation of a limited company, a company limited liability or company limited by shares. The merger of one or several foreign companies with one or more companies should lead to the Tunisian Incorporation of a company whose majority stake is to be held by persons Tunisian or entities. "

ii. Public Companies

In terms of acquisitions, no Tunisian regulations oblige companies to inform the public of such operations. However, General management attached to the Prime Ministry (when it comes to

privatization), law firms and business allowed to recover informations for a number of acquisitions in Tunisia.

f. Approvals by regulators

i. Limited Liability Companies

Most of these transactions are mergers and acquisitions and are referred to one family. Thus the problems of integration, corporate culture and organization are the characteristics of business combinations are lower for the Tunisian case. Most companies are absorbing large companies: the M&A may constitute a preferred mode of growth for large companies both in the perspective of expansion or diversification since they allow entrepreneurs to both accelerate growth, reduce costs and risk.

ii. Public Companies

The study of Tunisian database revealed that over half (51%) of acquired company are limited companies (SA). So 60% of the merged companies and 48% of companies are companies with absorbent limited liability company (LLC). The companies merged in a single-member company to Limited (SUARL) are very infrequent. It shows that 84% of mergers and acquisitions in Tunisia involve the same legal form of companies. 47% of operations of M&A meet two limited liability companies (LLCs). Only 16% of merged companies have different legal forms. In most cases, they are SA, SARL absorb.

g. Listed companies Vs unlisted companies.

**Such type of companies doesn't exist in Tunisia**

### III. Post Merger issues

a. Employees: transfer, termination and end of service issues

Contracts of employment of employees and executives of each company involved in the merger are automatically sent to the newly created company or absorbent. Employment contracts legally continue to have effect in relation to society.

Good corporate M&A isn't successful until integration is complete ... and that requires a disciplined process that involves high risks for both buyers and sellers.

What defines success in a merger or acquisition? It cannot be found in the transaction itself success can only come after integration is complete. We understand that the hardest work often occurs after the transaction closes. We focus on helping with **post-merger integration** services. Our goal is to make a smooth transition with expert planning and skilled execution.

b. Change of control provisions and third party consents

Tunisian merger control regulation applies only where one of the following thresholds exists:

- ✓ Combined market shares of the previous business year exceeding 30% of the sales purchases or all other transactions on the interior market for goods, products or substitutable services, or on a substantial portion of this market.

- ✓ Combined turnover on the local market exceeding an amount fixed by Decree (i.e. 20 Million Dinars pursuant to the provisions of the Decree n°2005-2038 dated December 12, 2005).
- ✓ The method of applying the general turnover is the difference between the global turnovers -before any tax-made by each related company and the recorded value of their exports, whether direct or through agents.

#### c. Assets

The aim of the Tunisian merger control regulation is to secure that the merger process does not interfere with conditions of competition and does not modify the market structure. Tunisian merger control regulation is applicable to any draft of a merger or transaction of a merger likely to create a dominating position on the local market or a substantial part thereof. The Competition Council, as referred to by the Minister in Charge of Trade assesses whether the agreement or draft of agreement contributes to the economical and social progress in order to compensate the interference with competition. Thus, while assessing the merger project, the Competition Council takes into account the necessity of consolidation or preservation of the local companies' competitiveness in front of international competition.

#### d. Other post merger issues:

The post-merger integration phase covers the operational part of the merger project. Often this phase decides if the merger becomes a success or failure.

Therefore, it is necessary to focus attention on issues like:

- Communication of the new strategic objectives and the new vision of the merged organization.
- Implementation of a new shared corporate culture and management culture.
- Development of a new management structure for the new, larger organization; especially overcoming of leadership problems in very large units.
- Bringing together formerly separate units from both former organizations.
- Harmonization of management compensation and management incentive systems
- Overcoming of language barriers and country specific cultural differences.
- Overcoming of staff's suspiciousness of the other organization ('Us vs. Them' syndrome).
- Filling of management positions.
- Allocation of responsibilities
- Knowledge transfer among units that are to be integrated
- Maintenance of customer relationships during integration phase.

Many mergers fail because of a lack of coverage of one or more of these issues.

## IV. Case study

The majority of the Tunisian companies acquired are PMEs: Since the Tunisian industrial fabric is composed of more than 90% of enterprises, making it a target for big business.

Mergers & acquisitions as a means of adapting to the International: finding valid also in 1995 with the different international commitments made by in 1995 as shocks and other events on Tunisian economy (reaction of the textile sector)(in 2006 and 2007 after the dismantling of the Multifibre in 2005 agreements).

a. The **STB**, successor to the **NTDB BDET**

The STB was established in 1957. It is the first national bank established in the wake of the independence of Tunisia. Operating primarily as a development bank, it has now fully as a commercial bank. Following its merger in 2000 with two development banks, the Bank for Economic Development of Tunisia (BDET) and the National Bank of Tourist Development (NTDB), partly owned by the state, the main owners of the STB are Currently the state directly, and public enterprises.

It should be noted that it was considered as the bigger Merger in Tunisia.

The first banking group in the country, born of the merger of the STB, BDET, NDTB is an impressive package for deposits and financial commitments.

Three years later, the collateral issues of post-merger related to the harmonization of laws still weigh on the management of the new entity, far from it.

b. Project of Merger agreement with **Société Tunisienne de Banque (STB)** and the **Banque de l'Habitat (BH)**

As an example, a study of the Merger of Société Tunisienne de Banque (STB) and the Banque de l'Habitat (BH).

Commenting on the transaction, it is the largest bank merger ever in Tunisia and it will create a giant with a market capitalization was around 1.1 billion dinars. This project? long-awaited vehicle a very strong message to the market that can revolutionize the Tunisian banking landscape.

The new entity will be the largest local bank with total assets in excess of 11 billion dinars, or nearly double the total assets of BIAT, the largest local bank with total assets of 6100 million dinars, said stock means that evokes "a real turning point for the two banking entities."

"These objectives can be linked to a growth strategy, and BH for almost two years cannot turn real growth is found to lag behind the industry. Access to other niche market segments where the approach to other types of clients will be within reach. "

It's kind of sanitation that the STB will be in perspective of a merger with the BH she is struggling to clean up its portfolio, until then, weighed down by large debts hanging.

In terms of numbers, net banking income of the new bank would be 431 million dinars and net income will be around 93 million dinars. In addition, the distribution of the new bank will consist of 207 agencies, employing over 4200 people.

In terms of banking intermediation, credit to customers will be the order of 8.4 billion and deposits around 7500 million dinars.